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No. 94-101

In The

Supreme Court of the United States

October Term, 1994

SHELLY L. MANN; ROBERT W. THORSON, individually and as representatives of the class, and BEVERLY KISH,

Petitioners,

vs.

PATRICK J. CONLIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. WHETHER THE CORRECT STANDARD WAS USED IN DISMISSING PETITIONERS' DAMAGE CLAIMS AND WHETHER THIS DECISION IS IN CONFLICT WITH *CONLEY* v. *GIBSON*, 78 S. Ct. 99 (1957).

B. WHETHER THE DOCTRINE OF JUDICIAL IMMUNITY JUSTIFIED THE DISMISSAL OF PETITIONERS' COMPLAINT AND WHETHER THIS DECISION IS IN CONFLICT WITH OTHER CIRCUITS.

C. WHETHER THE YOUNGER DOCTRINE REQUIRED THE LOWER COURT TO ABSTAIN FROM GRANTING PETITIONERS' PROSPECTIVE INJUNCTIVE RELIEF AND WHETHER THIS DECISION IS IN CONFLICT WITH OTHER CIRCUITS.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' REQUEST FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondent-Appellee relies upon Petitioner-Appellant's statement.

JURISDICTION

Respondent-Appellee relies upon Petitioner-Appellant's statement.

STATEMENT OF THE CASE

Petitioner-Appellants, Robert W. Thorson ("Thorson"), Shelly L. Mann ("Mann"), and Beverly Kish ("Kish"), (collectively referred to as Petitioners), are individual litigants in **domestic relations actions** which had been pending before Respondent, Judge Patrick J. Conlin, in Washtenaw County Circuit Court. After the commencement of this action, each of their cases was transferred to another trial judge. Petitioners are **not** representatives of a class. Certification as a class under Fed. R. Civ. P. 23 has never been granted. Thorson's and Mann's complaint alleges a variety of violations and improprieties by Judge Conlin (Appendix B). Proposed intervening Petitioner, Kish, cites additional wrongdoing by the Judge (Appendix C). All three believe that Judge Conlin violated their constitutional rights and are suing

for money damages as well as prospective injunctive relief and attorneys fees.

The facts in the three underlying cases, as alleged in the complaint and proposed intervenor's complaint, have been well documented and are set forth in Appendix B and C and in the briefs filed below. In the case of *Mary Jo Thorson* v. *Robert W. Thorson*, Case No. 87-38000-DM (MI. Cir. Ct. filed Nov. 24, 1987), Thorson essentially claims that the judge placed conditions (payment of the wife's attorney fees) on his right to participate in or obtain adjournments of various domestic relations hearings. (Appendix B: pp. 27a-31a, ¶19-22.)[1]

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[1] On September 7, 1988, the issue of whether the wording of the proposed judgment conformed to the record made on May 27, 1988 was before Judge Conlin. Thorson alleges that the judge ordered him to pay Five Hundred ($500.00) Dollars to his wife's attorney by noon that day if he wanted to proceed with the hearing. Since Thorson could not obtain the money, according to Thorson, the order which was entered did not conform to the record made on May 27, 1988. (Appendix B: pp. 27a-28a, ¶19.) (Thorson does not allege that he appealed the judgment and, in fact, no appeal was filed.) On December 14, 1988, a dispute arose regarding visitation. Thorson alleges that Judge Conlin ordered that a Friend of the Court referee hearing would be held only if Thorson paid a retainer of Five Hundred ($500.00) Dollars to his ex-wife's attorney, paid all of her attorney fees at One Hundred Twenty Five ($125.00) Dollars per hour, and agreed to be bound by the Friend of the Court recommendation. (Appendix B: p. 29a, ¶20.) (There are no allegations that the order, entered May 17, 1989, was appealed and, in fact, no appeal was filed.) Thorson requested an adjournment of the hearing held on May 18, 1990 because he was ill. According to Thorson, Judge Conlin stated that he would adjourn the hearing only if Thorson paid One Hundred Thirty Five ($135.00) Dollars to his ex-wife for the amount she claimed to be losing in wages for the day.

Appellant Mann makes allegations against Judge Conlin which relate to the case of *Randall L. Mann* v. *Shelly L. Mann*, Case No. 86-36538-DM (MI. Cir. Ct. filed Dec. 12, 1986). Mann alleged that the judge made erroneous rulings of law and procedure regarding child custody issues and that hearings were scheduled in violation of the court rules and/or while the issues were being considered by the Michigan Court of Appeals. She also claimed that Conlin failed to follow the directives of the Michigan Court of Appeals regarding visitation issues. (Appendix B: pp. 37a-43a, ¶29-35.)[2]

Since he could not pay the money, he proceeded with the hearing while ill. (Appendix B: pp. 29a-30a, ¶21.) However, Judge Conlin's denial of Thorson's motion to adjourn was affirmed by the Michigan Court of Appeals in *Thorson* v. *Thorson*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 133933), stating "[a]fter the motion was denied, Defendant [Thorson] proceeded to testify at length, and our review of his testimony reveals no impairment that may have prejudiced his case." Thorson's remaining allegations concern an order dated July 13, 1992 involving a custody motion. According to Thorson, Judge Conlin refused to set a date for an evidentiary hearing on the custody motion until Thorson paid his ex-wife's attorney fees in the amount of One Thousand Five Hundred Thirty Five ($1,535.00) Dollars, **as previously ordered** and until the appeal of an order dated June 20, 1990 was resolved. (Appendix B: pp. 30a-31a, ¶22.) Note that on August 31, 1992, Judge Kurtis T. Wilder of Washtenaw County Circuit Court also denied Thorson's request to have the custody issue referred to the Friend of the Court because it is inextricably woven with the appeal of the June 20, 1990 order.

[2] Mann first alleges that the judge changed custody of the children to her ex-husband based on a Friend of the Court recommendation, over her objections and without holding a de novo hearing as required by law. (Appendix B: pp. 37a-38a, ¶29.) According to Mann, Judge Conlin ordered that the

The third appellant is the proposed intervenor, Kish. Her proposed complaint refers to various actions

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children be turned over by noon that day, November 29, 1989. Mann did not turn over the children and filed a claim of appeal the next day. (Appendix B: p. 38a-39a, ¶30.) However, the Michigan Court of Appeals, in Docket No. 123650, determined that Mann had no right of appeal because the order changing custody was an interim or temporary order, not a final order. Accordingly, the court dismissed the appeal for lack of jurisdiction. Mann then filed an application for leave to appeal which was denied by the Michigan Court of Appeals in Docket No. 124402. See *Mann* v. *Mann*, 473 N.W.2d 702 (1991). (Appendix D.) On December 1, 1989, Judge Conlin ordered that Mann be remanded to jail until the children were turned over to her ex-husband as previously ordered. Mann was jailed for ten days until she capitulated, turned over the children, and was released. Mann alleges that the Court of Appeals ruled that the judge's actions were clear legal error. (Appendix B: pp. 38a-39a, ¶30.) But see *Mann* v. *Mann*, 476 N.W.2d 439 (1991), (the Court of Appeals held that Mann was properly held in contempt for violating the interim custody order). (Appendix D.) When an evidentiary hearing was finally held in the *Mann* case, six months had passed since the hearing was requested by Mann, in violation of a court rule requiring hearings within fifty six days. (Appendix B: pp. 39a-40a, ¶31.) At the conclusion of the hearing, according to Mann, Judge Conlin "took joint custody away from Plaintiff Mann when Randall Mann had not even requested it, ordered supervised visitation (with no evidence to support), and ordered child support to be recommended by the friend of the court. On all three points he was reversed and remanded." (Appendix B: p. 40a, ¶32.) In the hearing on remand from the Court of Appeals, Mann alleges that Judge Conlin did not follow the directives of the Court of Appeals. According to Mann, the judge ordered that the father of Mann's two younger children not be present during visitation for five years and that there be no smoking in the home while the two older children are visiting. (Appendix B: pp. 40a-41a, ¶33.) At a hearing regarding entry of the order, Mann claims that the judge entered

allegedly taken by Judge Conlin in the case of *Theodore G. Apostoleris* v. *Beverly A. Apostoleris*, Case No. 85-34532-DM (MI. Cir. Ct. filed Aug. 28, 1985). Kish asserts that the judge made domestic relations rulings while the judgment of divorce remained on appeal. According to Kish, Judge Conlin allegedly entered erroneous orders regarding costs in violation of his own previous orders. He allegedly made errors of law regarding child support issues and the payment of attorney fees. Kish claims that Judge Conlin improperly denied her an evidentiary hearing and otherwise showed favoritism towards her ex-husband.[3]

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an order which did not conform to the earlier record, over Mann's objections and without hearing some of her objections to the proposed order. (Appendix B: pp. 41a-42a, ¶34.) On January 8, 1992, Mann's ex-husband filed a motion requesting to move to Arkansas with the minor children. It was scheduled for a hearing even though Mann pointed out to the judge that jurisdiction of the visitation provisions of the court's order was in the Court of Appeals. An evidentiary hearing was convened in which, Mann alleges, she repeatedly objected on the ground of jurisdiction. Judge Conlin finally "stopped the hearing, phoned the Court of Appeals, and advised Randall Mann and his attorney to move for a remand. Subsequently, after remand from the Court of Appeals, he granted the permission to move." (Appendix B: pp. 42a-43a, ¶35.)

[3] Kish alleges that she filed a claim of appeal from the judgment of divorce entered on February 11, 1988. (Appendix C: Proposed complaint of Intervening Plaintiff, Beverly Kish, pp. 53a-54a, ¶3.) (The Court of Appeals affirmed the judgment of divorce in *Apostoleris* v. *Apostoleris*, unpublished opinion per curiam of the Court of Appeals, decided August 8, 1990 (Docket No. 106565).) Due to the appeal, according to Kish, Judge Conlin had no jurisdiction to act, yet he "proceeded as if there was no appeal" between February 11, 1988 and May 9, 1990. (Appendix

Respondent, Judge Conlin, filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Honorable Barbara K. Hackett of the U.S. District Court for the Eastern District, Southern Division, granted Respondent's Motion. The court found that Judge Conlin was protected by judicial immunity as the actions alleged were performed in his judicial capacity. Additionally, the court determined that

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C: p. 54a, ¶4.) Kish alleges that Judge Conlin entered an order dated May 5, 1989 suspending her visitation with the minor children until a psychological evaluation is made. The evaluation was never done and Kish is not allowed to visit her children. (Appendix C: pp. 54a-55a, ¶5.) (Kish does not allege that this order was appealed and, in fact, none was taken.) On October 24, 1990, Judge Conlin entered an order requiring Kish to pay Four Hundred Nine ($409.00) Dollars to Quality Care (the agency providing adult third-party supervision to the parties) for time spent in preparation of, and giving, testimony in court. Kish alleges this order was in violation of his earlier order, dated March 18, 1988, that the parties share the expense of Quality Care equally, and in violation of the law. (Appendix C: p. 55a, ¶6.) (There are no allegations that an appeal was taken from this order and, in fact, it was not appealed.) Kish alleges she was denied a de novo evidentiary hearing because the judge stated that he would grant the hearing but that it would not matter because he "always accepts the recommendation of the Friend of the Court." (Appendix C: p. 56a, ¶7.) Kish further alleges that Judge Conlin ignored the law with regard to imputation of income and ordered Kish to pay child support to her ex-husband, while the case was on appeal. (Appendix C: p. 56a, ¶8.) Finally, Kish alleges that Judge Conlin has violated the law and court rules regarding payment of her ex-husband's attorney fees and by showing favoritism toward her ex-husband. (Appendix C: pp. 56a-57a, ¶9.) (An appeal from an order regarding payment of attorney fees is currently pending in the Michigan Court of Appeals, Docket No. 147722.)

the *Younger* doctrine prevented the consideration of Petitioners' claims for prospective injunctive relief.

The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision. *Mann* v *Conlin*, 22 F.3d 100 (6th Cir. 1994). The court affirmed that although the district court did not cite the test enunciated in *Conley* v. *Gibson*, 355 U.S. 41 (1957), it is clear that the district court found that there was no set of facts that would allow these Plaintiffs to recover against Judge Conlin. The court also affirmed that Judge Conlin was acting in his judicial capacity and was therefore entitled to immunity for each of the allegedly "administrative" acts. Additionally, the court confirmed that *Younger* v. *Harris*, 401 U.S. 37 (1971), mandated abstention from hearing Petitioners' claims for injunctive and declaratory relief.

SUMMARY OF ARGUMENT

The court of appeals used the proper standard in affirming the granting of Respondent's Fed. R. Civ. P. 12(b)(6) motion. Citing *Conley*, 355 U.S. 41, the court of appeals found that it was clear that there are no set of facts which would permit these plaintiffs' to recover against Judge Conlin.

The court of appeals properly determined that judicial immunity barred Petitioners' claims for damages. First, each action alleged to be improper was judicial in nature. Second, none of Judge Conlin's actions was taken in the clear absence of all jurisdiction.

The court of appeals properly abstained from considering Petitioners' claims for prospective injunctive relief. Petitioners' request for prospective injunctive relief would require the federal judiciary to enjoin a state judicial proceeding implicating vital state interests. The state courts provided Petitioners with an adequate opportunity to challenge Judge Conlin's decisions by appealing his rulings to the state court of appeals. However, Petitioners repeatedly failed to avail themselves of this remedy and instead are attempting to convince the federal judiciary to reverse Judge Conlin's domestic relations decisions.

Additionally, Petitioners' allegation that the court of appeals decision conflicts with decisions from other circuits is unsupported and meritless.

ARGUMENT

A. THE CORRECT STANDARD WAS USED TO PROPERLY DISMISS PETITIONERS' DAMAGE CLAIMS FOR FAILURE TO STATE A CLAIM AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR ANY CIRCUIT.

Petitioners argue that the district court must have used the wrong standard in dismissing their claims pursuant to Fed. R. Civ. P. 12(b)(6) because the standard as enunciated by this Court was not quoted or cited in the district court's order of dismissal. What Petitioners fail to realize is that the district court relied on a Sixth Circuit Court of Appeals decision which cites the *Conley* standard, *Westlake* v. *Lucas*, 537 F.2d 857 (6th Cir. 1976). The court of appeals ruled that the district court used and

applied the proper standard even though it was not specifically quoted in the order of dismissal.

In reviewing the dismissal for failure to state a claim, the court must accept all well pleaded facts as true and view them in the light most favorable to the Plaintiffs. *Holloway* v. *Walker*, 765 F.2d 517, 519 (5th Cir. 1985) and *Lowe* v. *Letsinger*, 772 F.2d 308, 311 (7th Cir. 1985). In appraising the sufficiency of a complaint, it should not be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. **The court must focus on the facts pled, not Petitioners' conclusions regarding what the facts mean**, in determining whether Petitioners have shown they are entitled to relief. *Westlake*, 537 F.2d at 858, *United States Medical Corp.* v. *M.D. Buyline, Inc.*, 753 F. Supp. 676, 678 (S.D. Ohio 1990) and 27 Fed. Proc., L.Ed., § 62:468.

The court of appeals found that "although the district court did not cite the *Conley* test, it is clear . . . that the court found there was no set of facts that would allow these Plaintiffs to recover against Judge Conlin." (Appendix A: p. 5). Even if the court failed to use the appropriate standard, the error was harmless because, as demonstrated below, the court did not err in dismissing Petitioner's claims under *Conley*, 355 U.S. 41.

Petitioners next argue that they should have been given an opportunity to amend their complaint. It is important to note that Petitioners never requested leave to amend after dismissal of their claims. Accordingly, the issue was not decided by the court of appeals and cannot

be considered by this Court as grounds for reversal. *Ashelman* v. *Pope*, 793 F.2d 1072 (9th Cir. 1986) and *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977).

B. PETITIONERS' CLAIMS FOR DAMAGES WERE PROPERLY DISMISSED AS THERE WERE NO FACTUAL ALLEGATIONS WHICH WOULD DEFEAT JUDICIAL IMMUNITY. THIS DECISION DOES NOT CONFLICT WITH ANY OTHER CIRCUIT.

Judicial immunity has been the settled doctrine of the common law for many centuries. *Bradley* v. *Fisher*, 13 Wall. 335, 347 (1871). In *Bradley*, the United States Supreme Court reaffirmed the fact that a judge is immune from civil liability for judicial acts within the jurisdiction of the court. *Bradley*, 13 Wall. at 347. Like other forms of immunity, judicial immunity is immunity from suit, not just from assessment of damages. *Mireles* v. *Waco*, 112 S. Ct. 286 (1991).

> "[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the

> judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend." *Bradley*, 13 Wall. at 351-52.

The policy rationale behind the doctrine was summarized by the court in *Holloway*, 765 F.2d at 522:

> "[F]irst, and most important, a judge must be free to act upon his own convictions, without apprehension of personal consequences to himself; second, the controversiality and importance of the competing interests in contest before a court make it likely that the inevitable losing party may be overly willing to ascribe malevolent motives to the judge; third, judges faced with the prospect of damages actions would be driven to wasteful and distractive self-protection devices, such as excessive record-keeping; fourth, alternative remedies such as appeal and impeachment reduce the need for private rights of action against judges; and, fifth, the ease of alleging bad faith would make a qualified "good faith" immunity virtually worthless. *Bradley*, 13 Wall. at 347-54. These factors retain their vitality today. *Butz v. Economou*, 348 U.S. 478, 98 S.Ct. 2894, 2912, 57 L.Ed.2d 895 (1978). To them, one may add the need for finality of judgment."

Immunity can only be overcome in two sets of circumstances.

> "First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Forrester v White, 484

> US, at 227-229, 98 L Ed 2d 555, 108 S Ct 538; Stump v Sparkman, 435 US, at 360, 55 L Ed 2d 331, 98 S Ct 1099. Second, a judge is not immune for actions, although judicial in nature, taken in the complete absence of all jurisdiction. Id., at 356-357, 55 L Ed 2d 331, 98 S Ct 1099; Bradley v Fisher, 13 Wall, at 351, 20 L Ed 646." *Mireles*, 112 S. Ct. at 287.

The courts have struggled with developing a definition of "judicial act." *See Stump* v. *Sparkman*, 435 U.S. 349 (1977) and *Mireles*, 112 S. Ct. 286.

> "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i. e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i. e.*, whether they deal with the judge in his judicial capacity." *Stump*, 435 U.S. at 362 and *Mireles*, 112 S. Ct. at 286.

Compare Supreme Court of Virginia v. *Consumers Union*, 446 U.S. 719 (1967) (promulgation of rules regarding attorney advertising was not a judicial act therefore judicial immunity did not apply, however, the court was immune from suit in its legislative capacity) *and Forrester* v. *White*, 484 U.S. 219 (1988) (judge was not immune for the administrative task of firing an employee).

The focus is on the "nature" and "function" of the act generally, not the specifics of the "act itself." "In other words, we look to the particular act's relation to a general function normally performed by a judge." *Mireles*, 112 S. Ct. at 288-289.

> "[I]f only the particular act in question were to be scrutinized, then any mistake of a judge in

> excess of his authority would become a 'non-judicial' act, because an improper or erroneous act cannot be said to be normally performed by a judge. If judicial immunity means anything it means a judge 'will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority.'" *Id.* at 288, citing *Stump*, 435 U.S. at 356.

The **entry of an order, even if it is erroneous or in violation of law or procedure, is a judicial act** if the order is entered in the context of a suit pending before the judge. *See Morrison* v. *Lipscomb*, 877 F.2d 463 (6th Cir. 1989). An **incorrect determination does not make the act any less judicial**. *Dykes* v. *Hosemann*, 776 F.2d 942 (11th Cir. 1985). The **manner in which the order is entered does not change the nature of the act for purposes of immunity analysis**. *See Sun* v. *Forrester*, 939 F.2d 924 (11th Cir. 1991), *Ashelman*, 793 F.2d 1072, and *Holloway*, 765 F.2d 517. Even the **misuse of the court's power is subject to immunity** if the ultimate act performed is a judicial function. *Id.* at 524. *See Ashelman*, 793 F.2d 1072 (fact that judge allegedly conspired with prosecutor was of no consequence when ultimate act was judicial in nature.) *See Sun*, 939 F.2d 924, (judge making **derogatory comments** toward Defendant **during sentencing** on a criminal matter constitutes a judicial act which is protected by judicial immunity.)

Many actions by judges have been determined to be judicial in nature. Determination of **when** to decide a case and notify the parties of the outcome is a judicial function, even if it takes four years. *Lowe*, 772 F.2d 308. Docket control is key to the proper workings of a court and is classified as a judicial function. *Dellenbach* v. *Letsinger*, 889

F.2d 755 (7th Cir. 1989). **Requiring payment of One Thousand Two Hundred ($1,200.00) Dollars prior to consideration of an appeal was found to be a judicial act of the trial judge**, which was not taken in the clear absence of jurisdiction. *Dellenbach*, 889 F.2d 755. **Enforcement of the court's own orders, by contempt or otherwise, is a judicial function**. *Patten* v. *Glaser*, 771 F.2d 1178 (8th Cir. 1985).

Failing to follow proper procedure, substantive law or directives of the higher courts do not make an act any less judicial in nature. *Rolleston* v. *Eldridge*, 848 F.2d 163 (11th Cir. 1988), *Decker* v. *Hillsborough County Attorney's Office*, 845 F.2d 17 (1st Cir. 1988), and *Holloway*, 765 F.2d 517. **Even improperly refusing to accord a litigant a hearing is an act to which immunity applies**. *Rolleston*, 848 F.2d 755 and *Decker*, 845 F.2d 17.

Entry of orders regarding custody, visitation, and support, as well as contempt proceedings for violation of those orders, **including jail sentences, are judicial acts to which immunity attaches**. *Patten*, 771 F.2d 1178. Presiding over ex parte hearings which result in restriction of a family law litigant's visitation rights is a judicial act taken within the subject matter jurisdiction of the court.

There can be no question that the court of appeals correctly determined that immunity applies. Petitioners' bold assertion that the "Sixth Circuit's views on judicial immunity are far more limiting" than this Court intended, has no merit. Petitioners offer no support for their conclusions. Rather than attempt to prove the negative, Respondent relies on the cases cited above. If the Sixth Circuit's view on judicial immunity were improper,

Petitioners have failed to specifically identify cases which support their position.

The second aspect of judicial immunity involves the judge's jurisdiction. It has long been held that a judge is immune unless he acted in the "clear absence of all jurisdiction." *Bradley*, 13 Wall. at 351, *Stump*, 435 U.S. at 357, and *Mireles*, 112 S. Ct. at 287. The inquiry looks at **subject matter jurisdiction** of the court. *Stump*, 435 U.S. at 356. *Compare Maestri* v. *Jutkofsky*, 860 F.2d 50 (2nd Cir. 1988) (town justice acted in the clear absence of jurisdiction where he acted beyond his territorial limits) *and Dykes*, 776 F.2d 942 (judge was immune where he lacked personal jurisdiction over the Defendant because he had subject matter jurisdiction over the action). The scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. *Stump*, 435 U.S. at 356. The question is whether the court has the **power** to consider the question before it, rather than dismissing the litigant's claims for lack of jurisdiction. *Stump*, 435 U.S. 349. **That a decision was made incorrectly does not affect the fact that it was within the judge's power to make it.** *Dykes*, 776 F.2d at 947.

A distinction must be drawn between an act in the complete absence of jurisdiction, for which there is no immunity, and an act which is merely **in excess** of jurisdiction for which a judge is immune.

> "In *Bradley*, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and

> would not be immune from liability for his actions; on the other hand, if a judge of a criminal court should convict a Defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. *Id.*, at 352." *Stump*, 435 U.S. at 357 n. 7.

A judge is immune even if he commits grave procedural errors, makes an erroneous decision, enters an order in violation of statute or law, erroneously acts when exclusive jurisdiction is in the court of appeals, or fails and refuses to follow orders of a higher court. *Stump*, 435 U.S. 349, *Dellenbach*, 889 F.2d 755, *Rolleston*, 848 F.2d 163, *Decker*, 845 F.2d 17, *Patten*, and *Holloway*, 771 F.2d 1178. Such acts are merely in excess of the judge's jurisdiction and are within the realm of judicial immunity.

A review of the well pleaded facts from Petitioners' complaint reveals that all acts complained of were judicial acts which were not taken in the clear absence of all jurisdiction. Judge Conlin is a judge of Michigan's Circuit Court, sitting in Washtenaw County. Circuit courts are courts of general jurisdiction with original jurisdiction to hear domestic relations actions. (Appendix E: Mich. Comp. Laws § 600.601 and 600.605 1968.) Circuit courts also have the jurisdiction and power to fully effectuate and enforce their judgments and orders. (Appendix E: Mich. Comp. Laws § 600.611 1968.)

Mann and Kish both make several allegations that Judge Conlin acted without jurisdiction because he took certain actions while issues were pending on appeal. (Appendix B: pp. 38a-39a, ¶30 and pp. 42a-43a, ¶35. Appendix C: pp. 53a-54a, ¶3-4 and p. 56a, ¶8.) At the outset, it should be noted that it is not always easy, in

domestic relations actions, to determine whether a court has jurisdiction to consider particular issues where other issues have been appealed.[4] *Bradley*, 13 Wall. at 352 and *Stump*, 435 U.S. at 356. In fact, Thorson complains of the exact opposite conduct, i.e., that Judge Conlin refused to hear a motion while another issue was on appeal. (Appendix B: pp. 30a-31a, ¶22.) The law regarding custody, visitation, and support is interwoven. A decision in one area will impact on the others. However, this Court need not consider the propriety of Judge Conlin's actions. Federal courts have clearly ruled time and time again that **an action taken by a judge while jurisdiction is in the court of appeals is merely in excess of his authority and does not defeat immunity**. *Dellenbach*, 889 F.2d 755 and *Rolleston*, 848 F.2d 163. *See also Decker*, 845 F.2d 17 (judge immune for failing to grant a hearing on matters within jurisdiction of the court).

There are no other **factual** allegations in either the amended complaint or the proposed intervenor's complaint which attack the judge's jurisdiction. All that remains regarding this aspect of immunity are Petitioners' **conclusions** that Judge Conlin acted without jurisdiction. There are no facts which support such conclusions. The court must consider only the facts and draw its own conclusions. *Holloway*, 765 F.2d at 519, *Lowe*, 772 F.2d at 311, and *Westlake*, 537 F.2d at 858.

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[4] In such cases, the court has the continuing power to amend its previous judgments or orders regarding child custody, visitation or support for proper cause shown or because of a change of circumstances. (Appendix E: Mich. Comp. Laws § 722.27 1970.)

There are several allegations by each Petitioner that Judge Conlin acted outside his judicial function. In each case, the ultimate conduct complained of was a judicial act. Thorson alleges that Judge Conlin acted outside his judicial capacity by requiring him to pay his wife's attorney fees on three separate occasions prior to obtaining a hearing and by requiring him to pay his wife's lost wages as a condition of granting his motion to adjourn. (Appendix B: pp. 27a-35a, ¶19-23.) The Michigan Court Rules grant Judge Conlin the power to enter orders that one party's attorney fees be paid by the other side. The court rules also allow a judge the discretion to impose costs and conditions in granting an adjournment. (Appendix E: Mich. Ct. R. 3.206(A), 2.503(D).) Entry of the orders complained of by Thorson were judicial acts authorized by the court rules.

The remaining allegations of Thorson are aimed at the claim that various orders were entered in violation of law or procedure. That does not make them any less judicial in nature. *Rolleston*, 848 F.2d 163, *Decker*, 845 F.2d 17, and *Holloway*, 765 F.2d 577. Based on the **facts** pled by Thorson, all of his claims for damages are barred by judicial immunity.

Mann and Kish allege that Judge Conlin entered a number of erroneous orders. (Appendix B: pp. 37a-43a, ¶29-35, and Appendix C: pp. 53a-57a, ¶3-9.) Violations of procedural rules and entry of erroneous decisions are judicial acts which are accorded judicial immunity by the courts. *Rolleston*, 848 F.2d 163, *Decker*, 845 F.2d 17, and

Holloway, 765 F.2d 577. Petitioners' proper avenue is to appeal, not to sue the judge.[5]

In summary, Petitioners have not alleged facts which avoid the immunity bar. All acts complained of by Petitioners were judicial in nature and within the subject matter jurisdiction of the court. Their claims for damages[6] were therefore properly dismissed.

C. THE COURT OF APPEALS PROPERLY ABSTAINED FROM CONSIDERING PETITIONERS' REQUEST FOR PROSPECTIVE INJUNCTIVE RELIEF. THIS DECISION DOES NOT CONFLICT WITH ANY OTHER CIRCUIT.

The court of appeals properly affirmed the district court's dismissal of Petitioners' claims for declaratory and injunctive relief based on the abstention doctrine as

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[5] There are other remedies available to Plaintiffs. A request for rehearing or appeal are the most obvious ones. However, the Court Rules provide a procedure whereby an individual can request a writ of superintending control to compel a judge to perform his duties. (Appendix E: Mich. Ct. R. 3.301, 3.302.) An alternate remedy is available to Plaintiffs through the democratic process. They could simply campaign against the judge to have him removed from office. *See Bradley*, 13 Wall. at 350.

[6] Respondent acknowledges that judicial immunity does not bar Petitioners' claims for prospective relief. However, these claims are now moot because their cases have been transferred to other trial judges. The federal courts have consistently held that declaratory or injunctive relief should not be granted in the absence of a live case or controversy. Once the claim is no longer pending before the Respondent judge, prospective relief should be denied. *Ashelman*, 793 F.2d 1072, *Hansen* v. *Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975), and *Fowler* v. *Alexander*, 478 F.2d 694 (4th Cir. 1973).

set forth by *Younger* v. *Harris*, 401 U.S. 37 (1971) and its progeny. On appeal, Petitioners argue that the doctrine does not apply to cases arising out of 42 U.S.C. § 1983 because several courts addressing cases arising under § 1983 declined to abstain. This argument has no merit. Ironically, the *Younger* doctrine was developed in the context of § 1983. *Aristocrat Health Club of Hartford, Inc.* v. *Chaucer*, 451 F. Supp. 210, 214 (D. Conn. 1978).

The fact that some courts declined to abstain in a § 1983 case simply indicates that the doctrine is not applicable in all circumstances. However, the abstention doctrine was developed for cases similar to the one at bar.

> "In *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Supreme Court held that, absent 'extraordinary circumstances,' considerations of comity and federalism require the federal courts to abstain from enjoining pending criminal proceedings in state court. In subsequent cases, the court extended the doctrine of *Younger* to require abstention when the relief sought in federal court would interfere with ongoing state *civil* proceedings involving matters of special concern to the states." (Citations omitted. Emphasis in original.) *Cobb* v. *Green*, 611 F. Supp. 873, 873-874 (W.D. Mich. 1985).

Younger, 401 U.S. 37, and the subsequent cases espouse a strong federal policy against federal court interference with pending state judicial proceedings. *Carras* v. *Williams*, 807 F.2d 1286, 1290 (6th Cir. 1986). *See also Middlesex County Ethics Committee* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Abstention serves the policies of comity and federalism by preventing the federal courts from "unduly interfer[ing] with the legitimate activities

of the States." *Carras*, 807 F.2d at 1290, citing *Younger*, 401 U.S. at 44.

The abstention doctrine has been applied in cases similar to this one. In *Patten*, 771 F.2d 1178, a domestic relations litigant sued the judge presiding over his divorce case. The judge had entered several orders regarding custody, visitation, and support. Following non-compliance with the orders, the judge held contempt hearings and found both parties in contempt of court, sentencing them to five day jail sentences. The husband sued for injunctive relief and damages alleging that the judge had held him in contempt and imprisoned him in violation of his constitutional rights and without jurisdiction. After finding that plaintiff's claims for damages were barred by judicial immunity, the court abstained from hearing the remaining claims for prospective relief.

In a similar case, *Holeman*, 732 F. Supp. 726 (S.D. Tex. 1990), a domestic relations litigant sued a judge for violating his due process rights by holding ex parte hearings which resulted in a restriction of plaintiff's child visitation rights. The court initially determined that plaintiff's claims for damages were barred by judicial immunity and then went on to consider plaintiff's request for injunctive relief. The court determined that the claim for injunctive relief must be dismissed for two reasons.

> "First, 'there is a well established policy that **federal courts should abstain from exercising jurisdiction in domestic relations cases**.' Plaintiff argues a cause of action challenging the family court rulings that allegedly restricted his visitation rights. Plaintiff has not attacked the

> constitutionality of the rules or statutes governing the family court's procedures. Instead, Plaintiff's claims against Judge Elliott are 'enmeshed' in the underlying domestic relations controversy, which is a state – not federal – concern.
>
> Second, Plaintiff's claims are merely collateral attacks on the state court's judgment in the guise of a civil rights action. Plaintiff is, in essence, seeking a reversal in the federal court of a state court judgment. This court does not have jurisdiction to review the constitutionality of a judgment rendered in a state court. Plaintiff's proper course of action is to appeal the family court's ruling through the Texas state appellate courts to the United States Supreme Court." (Citations are omitted.) *Holeman*, 732 F. Supp. at 727.

See *Moore* v. *Sims*, 442 U.S. 415 (1979) (child custody involving alleged child abuse), *Huynh Thi Ahn* v. *Levi*, 586 F.2d 625 (6th Cir. 1978) (procedures and remedies provided under the Michigan Adoption Code), *Ward* v. *Hekman*, 497 F. Supp. 454 (1980) (challenging the constitutionality of an adoption decision), and *Cobb*, 611 F. Supp. 873 (1985) (civil contempt for non-payment of child support). These cases suggest family law and child custody are issues of paramount concern to the state.

Under the *Younger* doctrine as it has developed over the years, a federal court should decline to hear a case in which:

> (1) a federal court is called upon to enjoin a state judicial proceeding;

(2) the state proceeding implicates vital state interests; and

(3) the state proceeding provides an adequate opportunity to raise constitutional challenges. *Carras*, 807 F.2d at 1290 citing *Middlesex County*, 457 U.S. at 432.

All three Petitioners in this action have domestic relations cases pending in Washtenaw County Circuit Court. As demonstrated by the cases cited above, child custody, divorce, and other family law matters are vital state interests. Each Petitioner was afforded an opportunity to raise constitutional challenges to Judge Conlin's actions by way of appeal to the Michigan Court of Appeals, Michigan Supreme Court, and, ultimately, the United States Supreme Court. Petitioners have not attempted to avail themselves of this remedy with respect to many of the claimed violations by Judge Conlin.[7] Those that were appealed met with mixed reactions by the court. In some instances, Judge Conlin's actions were upheld and sometimes he was reversed. The Michigan Court of Appeals is not acting as a "rubber stamp" for the Respondent.

To avoid application of the *Younger* doctrine, this court must find that "extraordinary circumstances" exist. Courts have found that extraordinary circumstances exist

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[7] On at least one occasion, Plaintiffs failed to argue the claimed constitutional violations on appeal. In *Thorson* v. *Thorson*, unpublished opinion per curiam of MI. Court of Appeals, (Docket No. 133933), the Court stated, "defendant's equal protection argument has been abandoned on appeal because of defendant's failure to identify any relevant supporting authority. *In re Toler*, 193 Mich App 474, 477, 484 NW2d 672 (1992)."

where the state courts have indicated that they would not redress plaintiff's claimed constitutional violations. *See McKinstry* v. *Genesee County Circuit Judges*, 669 F. Supp. 801 (E.D. Mich. 1987). However, courts have found that extraordinary circumstances did **not** exist where the plaintiffs had an opportunity to raise their constitutional challenges in the state courts but did not avail themselves of that opportunity. *See Cobb*, 611 F. Supp. 873, and *Sevier* v. *Turner*, 742 F.2d 262 (6th Cir. 1984).

The existence of extraordinary circumstances is illustrated by a comparison of *Cobb*, 611 F. Supp. 873 and *McKinstry*, 669 F. Supp. 801. In both cases, plaintiffs sued trial judges challenging the courts' practice of refusing to appoint counsel to represent indigent defendants at hearings on charges of contempt of court for failure to comply with child support orders. The plaintiff in *Cobb*, 611 F. Supp. 873, argued that "extraordinary circumstances" were present because the Michigan Supreme Court had ruled in *Sword* v. *Sword*, 249 N.W.2d 88 (1976) that no general due process right to counsel exists in civil non-support contempt proceedings. This ruling was in contradiction to a subsequent United States Supreme Court decision, *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981). The *Cobb*, 611 F. Supp. 873, court determined that circumstances had changed since the Michigan Supreme Court's ruling in *Sword*, 249 N.W.2d 88, therefore it was possible that the Michigan Court of Appeals would follow *Lassiter*, 452 U.S. 18, rather than *Sword*, 249 N.W.2d 88, in ruling on plaintiff's case. Accordingly, the *Cobb* court abstained finding that an appeal to the state courts would not have been fruitless. *Cobb*, 611 F. Supp. 873.

The *McKinstry*, 669 F. Supp. 801, court was facing vastly different circumstances. By this time, the Michigan Court of Appeals had ignored *Lassiter*, 452 U.S. 18, and denied an indigent father his right to appointed counsel prior to being jailed for contempt for non-payment of child support. Further, the Genesee County Circuit Judges indicated that they would not appoint counsel unless directed to do so by the federal court. The *McKinstry*, 669 F. Supp. 801, court determined that it was not possible for plaintiffs to have their federal claims redressed in the state courts. Consequently, the federal court appropriately became involved in the state court proceeding.

The courts have recognized that the abstention doctrine may have severe results. Nevertheless, it must be applied when failure to do so would result in undue interference with the conduct of state courts. As stated in *Cobb*, 611 F. Supp. at 877:

> "Admittedly, the result reached here seems a harsh one . . . Yet the result the court reaches is required if the federal courts are to honor the principles of comity and federalism that underlie the *Younger* doctrine. Under that doctrine, **the federal courts are not to interfere with state court processes unless the state appellate courts have exhibited an unwillingness to enforce plaintiff's federal constitutional rights.** *Sevier*, 742 F.2d at 271; *Parker* [v. Turner], 626 F.2d [1] at 10 [(6th Cir. 1980)]. This court can only assume that the Michigan courts will correctly apply the constitutional principles set forth in *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), if plaintiffs appeal their claims in those

> courts. **Especially in a case like this, where plaintiffs ask a federal court to grant equitable relief that will affect the day-to-day conduct of state trial courts and possibly require ongoing supervision of state trial court judges, a federal court should not interfere when less intrusive avenues of relief are available.** *Parker*, 626 F.2d at 7, 8."

In the case at bar, Petitioners all have ongoing cases pending in the state circuit court and court of appeals. They are asking this court to become involved in the day-to-day handling of family law cases by a state circuit judge. Petitioners request equitable, declaratory, and injunctive relief against Judge Conlin, including ordering that he "(i) refrain from hearing any domestic family matters; (ii) amend his policies and practices in the specific manners herein complained of to stop his infringement of constitutional rights in his courtroom and in the administration of business of his court; (iii) institute internal record keeping procedures, and surveillance, to insure compliance with these orders." Petitioners also request declaratory and injunctive relief particular to their own cases. (Appendix B: pp. 48a-51a and Appendix C: pp. 62a-65a.)

It is exactly this type of state court intrusion that the abstention doctrine was designed to eliminate. Petitioners' complaint fails to allege extraordinary circumstances to avoid operation of the doctrine. The Petitioners in this case cannot show that the state court of appeals is unwilling to address and remedy any claimed violations of Petitioners' constitutional rights. In fact, Petitioners, as in *Cobb*, 611 F. Supp. 873, have not appealed many of the claimed constitutional violations. The *Younger* doctrine

was grounded in part on the fundamental requirement that a party must have no remedy available at law to seek equitable relief. Petitioners have an adequate remedy at law. They may appeal the various decisions, and seek redress of their constitutional claims in the state courts of appeal. Consequently, the court of appeals properly affirmed the district court's decision to abstain from hearing Petitioners' equitable claims.

CONCLUSION

As discussed above, the court of appeals correctly used the *Conley* standard in granting Respondent's motion to dismiss.

The court of appeals also properly found that Judge Conlin was protected by the cloak of judicial immunity because the acts complained of by Petitioners were judicial in nature and within the jurisdiction of Judge Conlin's court. Finally, the court of appeals properly abstained from considering Petitioners' claims for prospective injunctive relief finding that Petitioners' had failed to allege the necessary extraordinary circumstances required to overcome application of the abstention doctrine.

Petitioners' assertion that this is a nationally important case is embarrassing. Petitioner asserts that "the legal system is currently in a downswing-failing to meet its awesome responsibility." However, the legal system provides these Petitioners ample opportunity to challenge Judge Conlin's decisions. These Petitioners have repeatedly failed to take advantage of their right to

appeal. Instead, they are attempting to convince the federal judiciary to oversee the day to day operations of the Washtenaw County Circuit Court because they are dissatisfied with the manner in which Judge Conlin runs his courtroom.

Imagine the burden on the federal courts if they were charged with overseeing the domestic relation cases heard by state judges. Inevitably, in these cases, one of the parties becomes disgruntled by the divorce proceeding. If this court were to grant Petitioners' request, the floodgates would open, inundating every federal court with claims of judicial misconduct.

Petitioners' unsupported assertion that the court of appeals decision is in conflict with other circuits should not justify the granting of their Petition for Writ of Certiorari. Petitioners repeatedly make assertions that the court of appeals decision is inconsistent with prior decisions of this Court. However, upon review, these assertions prove to be meritless. The court of appeals decision is amply supported by the caselaw of this court. Additionally, Respondent has been unable to identify any conflict with any other circuit. For all of these reasons,

Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: August 31, 1994

No. 94-101

In The

Supreme Court of the United States

October Term, 1994

SHELLY L. MANN; ROBERT W. THORSON, individually and as representatives of the class, and BEVERLY KISH,

Petitioners,

vs.

PATRICK J. CONLIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

APPENDIX TO BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

APPENDIX E

MCL 600.601

Circuit courts have the power and jurisdiction

(1) possessed by courts of record at the common law, as altered by the constitution and laws of this state and the rules of the supreme court, and

(2) possessed by courts and judges in chancery in England on March 1, 1847, as altered by the constitution and laws of this state and the rules of the supreme court, and

(3) prescribed by rule of the supreme court.

MCL 600.605

Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.

MCL 600.611

Circuit courts have jurisdiction and power to make any order proper to, fully effectuate the circuit courts jurisdiction and judgments.

MCL 722.27(1)

If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen accidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may:

. . .

(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age, and, subject to section 4a, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

. . .

(f) Take any other action considered to be necessary in a particular child custody dispute.

MCR 3.206(A)

(1) In any domestic relations action, either party may request that the court order the other spouse to pay an attorney a specified sum to enable that party to prosecute or defend the action.

. . .

(3) The Court may order that a necessary and reasonable sum be paid to the attorney, either directly by the other spouse or from the spouse's assets over which the court has jurisdiction.

MCR 2.503(D)

(1) In its discretion the court may grant an adjournment to promote the cause of justice. An adjournment may be entered by order of the court either in writing or on the record in open court, and the order must state the reason for the adjournment.

(2) In granting an adjournment, the court may impose costs and conditions. When an adjournment is granted conditioned on payment of costs, the costs may be taxed summarily to be paid on demand of the adverse party or the adverse party's attorney, and the adjournment may be vacated if nonpayment is shown by affidavit.

MCR 3.301(A)

(1) A civil action or appropriate motion in a pending action may be brought to obtain

(a) superintending control,
(b) habeas corpus,
(c) mandamus, or
(d) quo warranto.

Unless a particular rule or statute specifically provides otherwise, an original action may not be commenced in the Supreme Court or the Court of Appeals if the circuit court would have jurisdiction of an action seeking that relief.

(2) These special rules govern the procedure for seeking the writs or relief formerly obtained by the writs, whether the right to relief is created by statute or common law. If the right to relief is created by statute, the limitations on relief in the statute apply, as well as the limitations on relief in these rules.

(3) The general rules of procedure apply except as otherwise provided in this subchapter.

MCR 3.302(A)

A superintending control order enforces the superintending control power of a court over lower courts or tribunals.

MCR 3.302(D)

(1) The Supreme Court, the Court of Appeals, and the circuit court have jurisdiction to issue superintending control orders to lower courts or tribunals. In this rule the term "circuit court" includes the Recorder's Court of the City of Detroit as to superintending control actions of which that court has jurisdiction.

(2) When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder's court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.